

In the Matter of Victor Onwuzuruike

DOP Docket No. 2004-3643

(Merit System Board, decided August 9, 2006)

The appeal of Victor Onwuzuruike, a Senior Security Guard with the Newark School District, of his removal effective May 3, 2004, on charges, was heard by Administrative Law Judge Ken R. Springer (ALJ), who rendered his initial decision on May 15, 2006. Exceptions were filed on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on August 9, 2006, accepted and adopted the Findings of Fact and Conclusions as contained in the attached initial decision and the ALJ's recommendation to reverse the removal.

DISCUSSION

The appellant was charged with insubordination, chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, neglect of duty and other sufficient cause. Specifically, the appointing authority asserted that the appellant left work without permission, traveled outside his assigned district, which resulted in a two-car accident, provided false information on his whereabouts and failed to deactivate the alarm system in several schools. The appointing authority also asserted that the appellant used profanity toward his supervisor and refused several direct orders. Upon the appellant's appeal to the Board, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ set forth that the appellant was being charged for several different incidents. The November 5, 2003 incident occurred when the appellant was involved in an automobile accident in East Orange. The appointing authority charged the appellant with traveling outside of Newark, providing false information and failing to complete the rest of his duties. Alonzo Evans, Assistant Director of Security Services, testified that the appellant provided false information on his incident report because it was "virtually impossible" for the appellant to have traveled the distance he covered in the time period specified. Evans also stated that the appellant had abandoned his duties by failing to finish his route after the accident. The appellant testified that he did not purposely leave the City limits but became lost on a rainy and foggy evening. Additionally, the appellant indicated that after the accident he contacted central dispatch and was ordered by Supervising Security Guard Irving Brown to discontinue his patrol and return to the motor pool. With regard to this incident, the ALJ found that the appellant did

not purposely leave Newark and that he was unable to continue his duties that evening due to a directive from his supervisor to return to the motor pool. Therefore, the ALJ found that the appointing authority did not sustain its burden of proof with regard to this incident.

With regard to the other incidents, the ALJ found that all of the prior incidents had already resulted in disciplinary action. Specifically, the ALJ indicated that the appointing authority had previously issued formal letters of reprimand to the appellant at the time that these incidents occurred. Therefore, because an employee cannot be punished twice for the same offense, the ALJ determined that all of these charges be dismissed.

Based on the foregoing, the ALJ dismissed all the charges against the appellant, and ordered his immediate reinstatement, along with mitigated back pay, benefits and reasonable counsel fees. Upon its *de novo* review of the record, the Board agrees with the ALJ's determination of the charges and penalty.

In its exceptions, the appointing authority contends that the ALJ erred in dismissing several of the charges and improperly based his decision on only part of the evidence presented. Specifically, it argues that the ALJ incorrectly determined that all but one of the charges related to prior disciplinary matters which could not appropriately be retried. Additionally, it asserts that the ALJ's conclusion that the appellant's supervisor, Supervising Security Guard Tony Horton, had a practice of placing written reprimands in employee files fails to address its contention that neither Horton nor anyone in the Security Department was authorized to implement discipline against employees. Such authority was reserved for its Labor Relations Unit. Further, it contends that Horton testified that despite using a form letter entitled "Letter of Reprimand," he simply intended to convey his position to his supervisors for consideration of discipline. Moreover, the appointing authority argues that the letter in connection with the July 16, 2003 incident, in which the appellant allegedly blocked Horton's vehicle with his patrol vehicle, made threatening hand motions and shouted obscenities, merely detailed the inappropriate behavior and stated that disciplinary action had been requested. Thus, it argues the July 16, 2003 incident should have been reviewed by the ALJ.

In his cross exceptions, the appellant argues that with the exception of the November 5, 2003 incident, he had been disciplined by written reprimands for all the other incidents. Additionally, the appellant states that these letters cannot be characterized as mere recommendations as the appointing authority contends, as the letters do not state that they are just recommendations and were copied to the Labor/Employee Relations Unit and his personnel file. Further, the appellant argues that these prior incidents cannot be used to "pad" the appointing authority's weak disciplinary case concerning the November 5, 2003 incident.

With regard to the appointing authority's contention that the ALJ erred in determining that most of the charges should be dismissed because the appellant had already received discipline for these incidents, the Board finds the ALJ's analysis and conclusions in this regard to be appropriate. Regardless of Horton's alleged intentions in placing the letters in the appellant's employee file, the fact remains that most of the letters on their face indicate that they are official letters of reprimand. Further, all of the letters are copied to the Labor/Employee Relations Unit and the appellant's personnel file and no attempt was made to pursue these charges until the appellant was involved in the accident on November 5, 2003. This fact cannot be ignored nor conveniently explained away by asserting that Horton did not have the authority to discipline employees. If such is the case, Horton should not be permitted to place letters of reprimand in employees' personnel files. With regard to the July 16, 2003 incident, the appellant's cross exceptions and the ALJ's initial decision indicate that both Horton's immediate supervisor and the Director of Operations refused to pursue further disciplinary action for this incident beyond the letter Horton placed in the appellant's file. In this regard, the ALJ noted that no attempt was made to resurrect these charges until the November 5, 2003 incident. As the ALJ indicated, the appointing authority had ample notice that the Board would reject its attempts to impose double punishment for the same offense and that it was improper to revive a stale charge in an attempt to impose a greater penalty at a later date. *See In the Matter of Christopher Eutsey* (MSB, decided February 14, 2001) and *In the Matter of Stuart Range* (MSB, decided May 27, 1997). In this regard, the Board notes that it will consider letters, such as those outlined above, as discipline and will reject an appointing authority's attempt for further punishment at a later date. The Board suggests that the appointing authority amend its practice of allowing supervisors without the authority to bring discipline from placing such letters in an employee's personnel file to avoid similar situations in the future.

Since the charges have been dismissed, the appellant is entitled to mitigated back pay, benefits, and seniority and reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2-2.12*.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Board's decision will not become final until any outstanding issues concerning back pay and/or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Merit System Board finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Board reverses that action and upholds the appeal of Victor Onwuzuruike and orders that he be granted back pay, benefits and seniority from May 3, 2004 through the date of his actual reinstatement. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by the appellant during this period. The Board further awards reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.12*. Proof of income earned and an affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay and/or counsel fees dispute.

The parties must inform the Board, in writing, if there is any dispute as to back pay and/or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Board will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.